146 U.S. 314

RECORD, CASE No. 15,070.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1100.

EDWARD W. HALLINGER, APPELLANT,

vs.

ROBERT DAVIS, JAILER OF HUDSON COUNTY, NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED JUNE 30, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1892.

1 In the Circuit Court of the United States, District of New Jersey.

EDWARD W. HALLINGER, Plaintiff and Appellant,
vs.
ROBERT DAVIS, Defendant and Appellee.

The above-named plaintiff, Edward W. Hallinger, considering himself aggrieved by the judgment entered on the 30th day of May, A. D. 1892, in the above-entitled proceeding, doth hereby appeal from said judgment to the Supreme Court of the United States, and he prays that this appeal be allowed and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. PESHALL,
Attorney for Plaintiff and Appellant.

And now, to wit, on the 30th day of May, A. D. 1892, it is ordered that the appeal be allowed as prayed for.

GEO. M. DALLAS, *Cir. Judge.*

May 30th, 1892.

(Endorsed:) U. S. circuit court, district of New Jersey. Edward W. Hallinger *vs.* Robert Davis. Notice of appeal and order granting the same. Charles J. Peshall, att'y for plaintiff. Filed May 30, 1892. S. D. Oliphant, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Robert Davis, jailor of Hudson county, New Jersey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the thirtieth day of June, 1892, pursuant to an appeal filed in the clerk's office of the circuit court of New Jersey, wherein Edward W. Hallinger is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable —— ——, judge of the — court of the United States, this 30th day of May, A. D. 1892.

GEO. M. DALLAS, *Cir. J.*

2½ [Endorsed:] U. S. circuit court, district of New Jersey. Edward W. Hallinger *vs.* Robert Davis. Citation.

I hereby acknowledge and accept service of the within citation Jersey City, May 31st, 1892.

ROBERT DAVIS,
Jailor of Hudson County.

3 In the Supreme Court of the United States, October Term, in the Year of our Lord One Thousand Eight Hundred and Ninety-two.

EDWARD W. HALLINGER, Plaintiff and Appellant,
vs.
ROBERT DAVIS, Defendant and Appellee.
} In Error.

Afterwards, to wit, on the 30th day of May, A. D. 1892, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in Washington, District of Columbia, comes the said Edward W. Hallinger, by his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

In refusing to issue the writ of *habeas corpus*, as prayed for.

Whereas by the law of the land the judgment ought to have been given for the said plaintiff against the said defendant, and the said plaintiff prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

CHARLES J. PESHALL,
Attorney for Plaintiff in Error.

(Endorsed:) U. S. circuit court, district of New Jersey. Edward W. Hallinger *vs.* Robert Davis. Assignment of error. Charles J. Peshall, att'y for plaintiff. Filed May 30, 1892. S. D. Oliphant, clerk.

4 In the Circuit Court of the United States, District of New Jersey.

To the honorable justice of said court:

Your petitioner, Edward W. Hallinger, respectfully shows and states that he is a subject of her majesty Victoria, Queen of England and Empress of India.

That he is now unlawfully imprisoned, detained, confined, and restrained of his liberty by Robert Davis, jailor of Hudson county, State of New Jersey, in the jail at Jersey City, county of Hudson, State of New Jersey.

That the only pretext or cause of such imprisonment, detention, and restraint is by virtue of a judgment and sentence of the court of oyer and terminer and general jail delivery of the county of Hudson, New Jersey.

That by the judgment and sentence of said court as aforesaid your petitioner has been and is now under sentence of death and illegally and unlawfully restrained of his liberty and detained in

said jail in violation of the Constitution and laws of the United States and in violation of the constitution and laws of the State of New Jersey and in violation of the treaty between the United States of America and Great Britain, all of which guarantee to your petitioner the right of trial by jury.

That your said petitioner was tried and convicted by the judges of the court of oyer and terminer and general jail delivery of the county of Hudson, New Jersey, without the interposition of a jury, of the crime of murder of the first degree and sentenced to death upon said judgment.

5 That no jury was ever empanelled to pass upon the guilt or innocence of your said petitioner, and that he was by said court found guilty after having been tried by the said judges of said court, who, after having heard the evidence, by their judgment and finding did upon the 12th day of May, A. D. 1891, find that your petitioner was guilty of murder of the first degree.

That afterward, by virtue of said judgment and finding of said court of oyer and terminer as aforesaid finding your petitioner guilty of the crime of murder, and without the interposition of a jury, — did upon the 5th day of May, A. D. 1892, sentence your said petitioner to be remanded to the common jail of Hudson county, as aforesaid, and to be there confined until the 2nd day of June, A. D. 1892, and then, upon said 2nd day of June, to be executed.

That your petitioner has never waived his right or attempted so to do to a trial by jury.

Article I, section 7, of the constitution of the State of New Jersey provides:

"The right of a trial by jury shall remain inviolate but the legislature may authorize the trial of civil suits when the matter in dispute does not exceed fifty dollars by a jury of six men."

That your petitioner states that there is no law or statute in the State of New Jersey that would authorize or does authorize a person charged with a capital offence waiving his constitutional right to a trial by jury, and your petitioner therefore asserts and main-

6 tains that he has been convicted of the crime of murder and sentenced to death without due process of law.

That your said petitioner is of the African race and black in color, and that by reason of his said race and color he was and is deprived of the equal protection of the laws, and that he is now confined as aforesaid in involuntary servitude by the said Robert Davis, as aforesaid, without having been duly convicted of any crime, all of which is in violation of the Constitution of the United States, the State of New Jersey, and the treaty between the United States of America and Great Britain.

That at the April term, A. D. 1891, of said court as aforesaid an indictment was returned by the grand jury of said county as aforesaid charging your said petitioner with the crime of murder, under section 68 of the criminal procedure act of the State of New Jersey, which provides:

"All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful deliberate and pre-

meditated killing or which shall be committed in perpetrating or attempting to perpetrate any arson, rape, sodomy, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed by examination of witnesses to determine the
7 degree of the crime and give sentence accordingly."

That said indictment does not charge your petitioner with the crime of murder of the first degree, and your petitioner maintains and asserts that under said indictment he has been illegally and unlawfully convicted of an offence of which he was not indicted, in violation of the Constitution of the United States and the constitution of the State of New Jersey.

A copy of said indictment and of the entire record and of the proceedings upon the same in said court of oyer and terminer as aforesaid is hereunto annexed and prayed to be made a part of this petition.

That section 68 of the criminal procedure act of the State of New Jersey, under and by virtue of which your petitioner was indicted, convicted, and sentenced, is unconstitutional and void and is in violation of the Constitution of the United States and of the State of New Jersey.

That by virtue of said judgment and sentence your petitioner states and says that one John J. McPhillips, who is the sheriff of Hudson county, State of New Jersey, threatens to hang and execute your said petitioner on the 2nd day of June, A. D. 1892, next.

That your petitioner states and says that by virtue of the statutes and laws of the State of New Jersey the right of appeal in murder cases is abolished, and that he has no right under the said laws as a matter of right to appeal to any higher court within the State to review or annul said illegal, unlawful, unwarranted judgment and sentence of said court as aforesaid.

8 Wherefore to be relieved of said illegal and unlawful imprisonment and detention your petitioner prays that a writ of *habeas corpus*, to be directed to the said Robert Davis, jailor of Hudson county, State of New Jersey, may issue in his behalf, so that your petitioner may be forthwith brought into this court to do, submit to, and receive what the law may require, and that your petitioner be discharged.

EDWARD W. HALLINGER.

UNITED STATES OF AMERICA, }
State of New Jersey, } *ss:*

Edward W. Hallinger, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made he believes to be true.

EDWARD W. HALLINGER.

Subscribed and sworn to before me this 23rd day of May, A. D. 1892.

M. SALINGER,
[L. S.] *Notary Public of New Jersey.*

Hudson Oyer and Terminer and General Jail Delivery, April Term, A. D. 1891.

HUDSON COUNTY, *To wit:*

The grand inquest of the State of New Jersey in and for the body of the county of Hudson upon their respective oath present
9 that Edward W. Hallinger, late of the city of Jersey City, in the said county of Hudson, on the fifth day of April, in the year of our Lord one thousand eight hundred and ninety-one, with force and arms, at the city of Jersey City aforesaid, in the county of Hudson aforesaid and within the jurisdiction of this court, did wilfully, feloniously, and of his malice aforethought kill and murder Mary Hallinger, alias Mary Peterson, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

And the grand inquest aforesaid on their oath aforesaid do further present that the said Edward W. Hallinger, on the fifth day of April, in the year of our Lord one thousand eight hundred and ninety-one, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, with force and arms, at the city of Jersey City as aforesaid, in the county of Hudson aforesaid, in and upon one Mary Hallinger, alias Mary Peterson, in the peace of God and of this State, then and there being feloniously, willfully, and of his malice aforethought did make an assault, and that he, the said Edward W. Hallinger, then and there with a certain hatchet, which he, the said Edward W. Hallinger, in both his hands then and there had and held, the said Mary Hallinger, alias Mary Peterson, in and upon the head of her, the said Mary Hallinger, alias Mary Peterson, then and there willfully, feloniously, and of his malice aforethought did strike and cut, giving unto her, the said Mary Hallinger, alias Mary Peterson, then and there with the said hatched by the stroke aforesaid, in manner aforesaid,
10 in and upon the head of her, the said Mary Hallinger, alias Mary Peterson, one mortal wound of the length of three inches, of the width of two inches, and of the depth of two inches, of which said mortal wound the said Mary Hallinger, alias Mary Peterson, then and there instantly died.

And so the grand inquest aforesaid upon their oaths aforesaid do say that he, the said Edward W. Hallinger, her, the said Mary Hallinger, alias Mary Peterson, in manner and by the means aforesaid wilfully, feloniously, and of his malice aforethought did kill and murder contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

C. H. WINFIELD,
Prosecutor of the Pleas.

Court of Oyer and Terminer and General Jail Delivery of the County of Hudson, New Jersey, April Term, 1891.

THE STATE
vs.
EDWARD W. HALLINGER } Indictment for Murder.

April 14th, 1891.—The defendant, being charged, pleads guilty; whereupon the court order said plea of guilty to be held in abeyance subject to said defendant's consultation with his counsel, Gilbert Collins, Esquire, who is now assigned for the purpose of consultation concerning said plea. The court further order said defendant to be remanded pending further proceedings.

11 April 17th, 1891.—The defendant and his counsel again appear and insist on his plea of guilty; whereupon the court continues said assignment of counsel and order said defendant to be present on Tuesday, April 28th, 1891, at an examination to determine the degree of guilt under said plea, to be then there had by said court, and said defendant is again remanded by the court.

April 28th, 1891.—The court, Knapp, J., and Lippincott, J., examine, on hearing evidence, and said defendant and his counsel being present, into the degree of defendant's guilt as aforesaid. The defendant is again ordered to be remanded.

May 12th, 1891.—The court—present, Knapp, J., and Lippincott, J.—adjudge the defendant guilty of murder of the first degree.

And afterwards, to wit, on Tuesday, the fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-one, at a session of the court of oyer and terminer and general jail delivery aforesaid, being as yet of the term of April aforesaid, before the Honorable Manning M. Knapp, justice aforesaid, and Job H. Lippincott, Elijah T. Paxton, and Albert Hoffman, judges of the inferior court of common pleas aforesaid, at Jersey City aforesaid, in the county of Hudson aforesaid, here cometh the said Edward W. Hallinger, under the custody of John J. McPhillips, Esquire, sheriff of the county of Hudson aforesaid, in whose custody in the jail of the county aforesaid he had been before committed for the cause aforesaid, being brought to the bar here in his proper person by the

12 sheriff aforesaid, to whom he is also here committed, and having heard the indictment adn forthwith being commanded of and concerning the premises in the said indictment above specified and charged upon him how he will acquit himself thereof, he saith he is guilty thereof.

Therefore let the said indictment be continued and the said plea of guilty as charged of the said Edward W. Hallinger be held in abeyance until and Gilbert Collins be assigned of counsel to said Edward W. Hallinger that he, the said Edward W. Hallinger, be fully advised of the truth, force, and effect of his said plea of guilty as charged.

At which time—that is to say, on Friday, the seventeenth day of April, in the year of our Lord one thousand eight hundred and

ninety-one, being as yet of the term of April aforesaid—at Jersey City aforesaid, in the county of Hudson aforesaid, before the said Manning M. Knapp, Esquire, justice aforesaid, and Job H. Lippincott, Elijah T. Paxton, and Albert Hoffman, judges of the inferior court of common pleas in and for the county of Hudson aforesaid, here again cometh the said Edward W. Hallinger under the custody of the sheriff as aforesaid, who, being brought to the bar here in his proper person by the said sheriff and having been advised of his said counsel, Gilbert Collins, Esquire, assigned as aforesaid, of the truth, force, and effect and consequences of his said plea of guilty, as charged, again insisteth on his plea of guilty as charged aforesaid; whereupon let the said indictment be continued until and an examination into the degree of guilt of the said Edward W. Hal-
13 linger on his plea of guilty as charged as aforesaid by and before the said Manning M. Knapp, Esquire, justice as aforesaid, and Job H. Lippincott, Elijah T. Paxton, and Albert Hoffman, judges of the inferior court of common pleas in and for the county of Hudson aforesaid, at Jersey City aforesaid, in the county of Hudson aforesaid, be had on Tuesday, the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and ninety-one, according to the form of the statute in such case made and provided, and let the said Edward W. Hallinger be then and there present.

At which time—that is to say, on Tuesday, the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and ninety-one, being as yet of the term of April aforesaid—at Jersey City aforesaid, in the county of Hudson aforesaid, before the said Manning M. Knapp, Esquire, justice as aforesaid; Job H. Lippincott, Elijah T. Paxton, and Albert Hoffman, judges of the inferior court of common pleas in and for the county aforesaid, here cometh as well the said Charles H. Winfield, prosecutor of the pleas in and for the county of Hudson aforesaid, as the said Edward W. Hallinger under the custody of the sheriff as aforesaid, being brought to the bar here in his proper person by the said sheriff; and thereupon the examination as aforesaid into the degree of guilt of the said Edward W. Hallinger on his plea of guilty as aforesaid is commenced by and before the said court and is continued from day to day until Tuesday, the twelfth day of May, in the year of our Lord one thousand eight hundred and ninety-one, as yet of the term of April aforesaid, at Jersey City aforesaid, in the county of Hudson aforesaid, on which
14 last-mentioned day the said court, in the presence of the said Edward W. Hallinger, here in the custody of the sheriff as aforesaid, being brought to the bar here in his proper person by the said sheriff, do say and adjudge that the said Edward W. Hallinger is guilty of the murder aforesaid on him above charged in manner and form aforesaid as in and by the said indictment is above supposed against him, and said court do adjudge, designate, and find that the degree of the said murder is murder of the first degree, and that he, the said Edward W. Hallinger, is guilty thereof.

And on the same last-mentioned day, to wit, on Tuesday, the twelfth day of May, in the year of our Lord one thousand eight

hundred and ninety-one, being as yet of the term of April aforesaid, it was demanded of him, the said Edward W. Hallinger, if he hath or knoweth anything to say whereof the court here ought not to proceed to judgment against him, who nothing further saith unless as he has before said.

Thereupon all and singular the premises being seen and by the court here fully understood—

The sentence of the law is and it is by the court now here considered and adjudged that the said Edward W. Hallinger be taken by the sheriff aforesaid from the bar of the court to the jail of the county from whence he came, there to remain and be kept in close custody and confinement until Tuesday, the thirtieth day of June next, in the year of our Lord one thousand eight hundred and ninety-one, on which day, between the hours of ten in the forenoon and three in the afternoon of that same day, he be taken by
15 the sheriff of said county to the place of execution provided by him according to law, and then and there he, the said Edward W. Hallinger, be by him, the said sheriff, hanged by the neck until dead.

Judgment signed this twelfth day of May, in the year of our Lord one thousand eight hundred and ninety-one.

MANNING M. KNAPP,
Associate Justice of the Supreme Court of New Jersey.
JOB H. LIPPINCOTT,
E. T. PAXTON,
ALBERT HOFFMAN,
President Judge and Associate Judges of the Inferior Court of Common Pleas, Hudson County, New Jersey.

And in the Matter of EDWARD W. HALLINGER for Writ of *Habeas Corpus.*

In the circuit court of the United States for the district of New Jersey, holden at Trenton, in said State of New Jersey, on this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and ninety-one, now comes the said petitioner, Edward W. Hallinger, by his attorney, Charles J. Peshall, in his said behalf moving, and prays the court in his said petition for a writ of *habeas corpus* to issue out of said court.

That upon the reading and filing of said petition and upon the consideration of the matters and things therein set forth, the
16 court denies the issuance of the writ as prayed for.

Thereupon the said Edward W. Hallinger, by his said attorney, Charles J. Peshall, does move the court to grant an appeal to the Supreme Court of the United States, which appeal is hereby granted.

And upon this twenty-third day of November, one thousand eight hundred and ninety-one, before the said Supreme Court of the United States of America, at Washington, in the District of Columbia, cometh the said Charles H. Winfield, prosecutor of the pleas in and for the county of Hudson, in the State of New Jersey, and the

said Edward W. Hallinger nor his said attorney, Charles J. Peshall, nor any attorney or person in his said behalf, cometh not.

Whereupon, on the day last aforesaid the said Charles H. Winfield, prosecutor of the pleas as aforesaid, does move that the appeal aforesaid of the said Edward W. Hallinger be dismissed for want of prosecution.

Whereupon the said Supreme Court of the United States of America on the last day aforesaid do order that the said appeal of the said Edward W. Hallinger be dismissed.

And now, on this Wednesday, the sixth day of January, one thousand eight hundred and ninety-two, being now of the term of December, one thousand eight hundred and ninety-one, at a session of our court of oyer and terminer and general jail delivery as aforesaid, before the Honorable Manning M. Knapp, justice aforesaid, and Job H. Lippincott, Elijah T. Paxton, and Albert Hoffman, judges of the inferior court of common pleas, as aforesaid, at
17 Jersey City aforesaid, cometh the said Edward W. Hallinger in the custody of the sheriff of the county of Hudson as aforesaid, and the said Edward W. Hallinger being placed to the bar, it was demanded of him, the said Edward W. Hallinger, if he hath or knoweth anything to say wherefore the court here ought not to proceed to judgment against him, who nothing further saith unless as he has before said.

Thereupon all and singular the premises being seen and by the court here fully understood—

The sentence of the law is and it is by the court now here considered and adjudged that the said Edward W. Hallinger be taken by the sheriff aforesaid from the bar of this court to the jail of the county whence he came, there to remain and be kept in close custody and confinement until Wednesday, the tenth day of February, in the year of our Lord one thousand eight hundred and ninety-two, on which said day, between the hours of ten in the forenoon and three in the afternoon of that same day, he be taken by the sheriff of said county to the place of execution provided by him according to the law, and then and there he, the said Edward W. Hallinger, be by him, the said sheriff, hanged by the neck until dead.

Judgment signed this sixth day of January, in the year of our Lord one thousand eight hundred and ninety-two.

JONATHAN DIXON,
Associate Justice of the Supreme Court of New Jersey.
JOB H. LIPPINCOTT,
President Judge.
18 E. T. PAXTON AND
ALBERT HOFFMAN,
Associate Judges of the Inferior Court of Common Pleas, Hudson County, New Jersey.

And now, on this fifth day of May, eighteen hundred and ninety-two, being now of the term of April, eighteen hundred and ninety-two, at a session of our court of oyer and terminer and general jail delivery aforesaid, before the Honorable George T. Werts, one of the

justices of the supreme court of judicature of the State of New Jersey, and Job H. Lippincott, Albert Hoffman, and John Kenny, judges of the inferior court of common pleas in and for the said county of Hudson and State of New Jersey, at Jersey City aforesaid, cometh the said Edward W. Hallinger, in the custody of the sheriff of the county of Hudson as aforesaid, and the said Edward W. Hallinger being placed to the bar it was demanded of him, the said Edward Hallinger, if he hath or knoweth anything to say wherefore the court here ought not to proceed against him, who nothing further saith unless as he has before said.

Thereupon all and singular the premises being seen and by the court here fully understood—

The sentence of the law is and it is by the court now here considered and adjudged that the said Edward W. Hallinger be taken by the sheriff aforesaid from the bar of this court to the jail of the county whence he came, there to remain and be kept in close custody and confinement until Thursday, the second day of June, in the year of our Lord one thousand eight hundred and
19 ninety-two, on which day, between the hours of ten in the forenoon and three in the afternoon of that same day, he be taken by the sheriff of said county to the place of execution provided by him according to law and then and there he, the said Edward W. Hallinger, be by him, the said sheriff, hanged by the neck until dead.

Judgment signed this fifth day of May in the year of our Lord one thousand eight hundred and ninety-two.

GEORGE T. WERTS,
Associate Justice of the Supreme Court of New Jersey.
JOB H. LIPPINCOTT,
President Judge, and
ALBERT HOFFMAN,
JOHN KENNY,
Associate Judges of the Inferior Court of Common Pleas, Hudson County, New Jersey.

STATE OF NEW JERSEY, *Hudson County,* } *ss:*

I, Dennis McLaughlin, clerk of the court of oyer and terminer and general jail delivery of the county of Hudson aforesaid, do hereby certify the foregoing to be a true and correct copy of a judgement entered in the minutes of said court of oyer and terminer and now of record in my office.

In witness whereof I have hereunto set my hand and af-
[L. S.] fixed the seal of said court and county this 5th day of May, A. D. 1892.

DENNIS McLAUGHLIN, *Clerk.*

20 (Endorsed :) U. S. circuit court, district of New Jersey. Edward W. Hallinger *vs.* Robert Davis. Petition for writ of *habeas corpus,* May 30th, 1892. It appearing by the statement of

Charles J. Peshall, Esq., counsel for the petitioner, that, upon a similar application on behalf of the same petitioner, the writ was refused by Hon. Edward T. Green, judge of the district court of the United States for the district of New Jersey, the writ as within applied for is also refused. Geo. M. Dallas, cir. judge. C. H. Peshall, att'y for petitioner. Filed May 30, 1892. S. D. Oliphant, clerk.

21 UNITED STATES OF AMERICA, } *ss:*
District of New Jersey, }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a true copy of the record and proceedings in the suit of Edward W. Hallinger against Robert Davis as the same remains on file and of record in my office, at Trenton, in said district.

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Trenton, in said district, this twenty-third day of June, A. D. 1892.

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: Case No. 15,070. New Jersey C. C. U. S. Term No., 1100. Edward W. Hallinger, appellant, *vs.* Robert Davis, jailor of Hudson county, New Jersey. Filed June 30, 1892.

146 U 8314

Office Supreme Court U. S.
FILED.
NOV 11 1892
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1100.

EDWARD W. HALLINGER,

Against

ROBERT DAVIS,
Jailor of Hudson Co.

Appeal from the Circuit Court of the United States for the District of New Jersey.

BRIEF FOR APPELLANT.

B. F. RICE,
Attorney for Appellant.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

No. 1100.

EDWARD W. HALLINGER,
vs.
ROBERT DAVIS.

Brief for Appellant.

STATEMENT OF CASE.

On the 30th day of May, A. D. 1892, the appellant, Edward W. Hallinger, presented to the Circuit Court of the United States for the District of New Jersey, a petition setting forth, in substance, the following facts:

First. That he is a subject of Her Majesty Victoria, Queen of England and Empress of India.

Second. That he is now imprisoned and confined by Robert Davis, Jailor of Hudson County, State of New Jersey, in the jail at Jersey City, in said State.

Third. That the only pretext or cause of such imprisonment is by virtue of a judgment and sen-

tence of the Court of Oyer and Terminer and General Jail Delivery of said County and State.

Fourth. That he was convicted and sentenced without the interposition of a jury.

Fifth That he was tried for murder, and convicted of the crime of murder of the First degree by the Judges of said Court.

Sixth. That no jury was ever empannelled to pass upon the guilt or innocence of the appellant.

Seventh. That the appellant did not waive his right, or attempt to waive his right to a trial by jury.

Eighth. That the petitioner is of the African race and black in color and that he is deprived of the equal protection of the laws.

Ninth. That there is no law or statute in the State of New Jersey authorizing a person charged with a capital offense to waive his constitutional right to a trial by jury.

Tenth. That the indictment does not charge the petitioner with the crime of murder of the first degree.

Eleventh. That he has been convicted of an offense for which he was not indicted.

Twelfth. That the section of the Criminal Procedure Act of New Jersey under which he was indicted is unconstitutional and void.

Thirteenth. That there is no right of appeal in murder cases, from the trial court, under the laws of New Jersey.

Fourteenth. That the Sheriff of Hudson County, New Jersey, threatens to execute him, under said sentence, on the 2d day of June, A. D. 1892.

Fifteenth. That he was convicted and sentenced to death without due process of law, and in violation of the Constitution and laws of the United States, and of the State of New Jersey, and in violation of the treaty between the United States of America and Great Britain.

Sixteenth. That he prays that a writ of *Habeas Corpus* be issued in his behalf, and that he be discharged.

Annexed to the petition was a copy of the indictment and of the proceedings of the Court of Oyer and Terminer and General Jail Delivery.

The Circuit Court of the United States made an order denying the said petition and from that order this appeal was taken.

POINTS.

I.

The defendant can not waive his constitutional rights in so material a point as trial by jury, and if he could he could only do so directly and not by implication.

A plea of guilty is not a waiver of a right to a trial by jury.

The most that can be said of it is that it dispenses with such trial. But a plea of guilty to a crime that has degrees does not dispense with the necessity for a jury trial to ascertain the degree. The plea of guilty has never been held to apply to the first

degree, or any other, unless the defendant designates the degree to which his plea applied.

In case the statute had provided that the jury before whom the defendant was tried should, if they found him guilty, say so and no more, and that thereupon the court should upon the evidence given before the jury, designate whether it be murder in the first or second degree, would that be giving the defendant a trial by a jury? To make it a trial by jury every material fact in the case must be decided by the jury, and it is a very material fact that settles the degree of the crime.

Now, if such a statute as is above described would not be constitutional because it did not provide for a trial by jury, wherein is the statute that allows the court to designate the degree of the crime upon a plea of guilty in any better attitude?

The plea of guilty is no stronger than a verdict of guilty.

Hence so much of the statute of New Jersey as provides that the judges may designate the degree in case of confession is unconstitutional and void, and the appellant in this case has been sentenced upon a state of facts found by the court which were not confessed by the appellant or passed on by a jury.

Wartner vs. State, 102 Ind., 51.
Lemons vs. State, 4 W. Va., 455.
Williams vs. State, 12 Ohio St., 622.
State vs. Holt, 90 N. C., 750.
Giles vs. State, 23 Texas App., 285.
Robins vs State, 8 Ohio State, 131.
Cancemi vs. People, 18 N. Y., 136.

II.

The indictment is fatally defective, as an indictment for murder in the first degree.

Where the crime by statute is divided into degrees and the charge is that the defendant is guilty of the first degree the words of the statute that distinguish that degree from lower ones must be used, and this is so whether the indictment is framed under the statute or common law. A common law indictment for murder in a State where the statute has divided the crime into degrees, if it lacks the statutory words is no better than an indictment under the statute with the statutory words left out.

As to murders perpetrated by means named in the statute, such as poison, lying in wait, or such as are committed in the perpetration of some other crime, the distinguishing language of "willful, deliberate, and premeditated," need not be used, but in setting out any other mode of killing these words become material, and without them the indictment is void as an indictment for murder in the first degree, and the appellant is held without due process of law.

To constitute the crime of murder of the first degree it is essential that the killing be done with malice aforethought, that it be done wilfully, and also that it be done deliberately and premeditatedly.

State vs. Shelton, 64 Iowa, 337.

Fouts vs. State, 4 G. Greene, Iowa, 500.

Robbins vs. State, 8 Ohio St., 131.

Kain vs. State, 8 Ohio St., 306.

Fouts vs. State, 8 Ohio St., 98.
People vs. Potter, 5 Mich., 1.
Johnson vs. Commonwealth, 24 Penn. St., 386.
Schlenker vs. State, 9 Neb., 300.
Caldwell vs. State, 41 Texas, 86.
O'Mara vs. Commonwealth, 75 Penn. St., 424.
State vs. Cleveland, 58 Maine, 564.
Bishop on Criminal Procedure, Sec. 591-605.
State vs. McCormick, 27 Iowa, 402.
Garvey vs. The People, 4 Colorado 559.

We especially call the attention of the Court to the case of *State vs. McCormic* (*supra*). The Statute of Iowa and New Jersey being similar, the opinion was written by Chief Justice Dillon.

The appellant was indicted under Sec. 68, Crimes' Act, Revision N. J. Statutes, p. 239.

III.

The time given by the Court to make this brief has not been sufficient for an examination of all the authorities applicable to the case. There may be some that conflict with those above cited. But one case cited by appelle's counsel, Green vs. the Commonwealth, 12 Allen 167 is notin conflict. There the defendant plead guilty to murder in the first degree and the Court say that their decision might have been different if he had plead generally to the indictment.

IV.

The defendant is without remedy in the Courts of the State where he was tried.

The statute gives the defendant in a capital case no *right* of appeal, and in case of confession

no appeal, (apparently) at all, certainly not that will stay execution.

Statute N. J. vol 2, p. 211.

We respectfully submit that the appellant is held without due process of law and ought to be discharged.

B. F. RICE,
Attorney for Appellant.

146 U.S. 314

Office Supreme Court U. S.
FILED.
OCT 13 1891
JAMES H. McKENNEY,
CLERK.

United States of America,

IN THE UNITED STATES SUPREME COURT.

THE STATE OF NEW JERSEY,
Appellee,

and

EDWARD W. HALLINGER,
Appellant.

On Appeal from U. S. Circuit Court, District of New Jersey.

Certificate of Circuit Court Clerk.

State of the case & Brief

C. H. WINFIELD,

Solicitor for Appellee.

1891.
ALBERT DATZ, BOOK AND JOB PRINTER,
34-36 COLES ST., JERSEY CITY.

FILED,
OCT 12 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE STATE OF NEW JERSEY, APPELLEE,

AND

EDWARD W. HALLINGER, APPELLANT.

ON APPEAL FROM U. S. CIRCUIT COURT, DISTRICT OF NEW JERSEY.

On behalf of appellee, I move—

1st. To affirm the judgment of Judge Green, sitting in the circuit court of the United States for the district of New Jersey, refusing to issue a writ of *habeas corpus* on the petition of said Hallinger.

2d. To dismiss said appeal on the ground that said appeal has not been perfected, nor anything done thereon to bring the same before this Court.

C. H. WINFIELD,
Solicitor and of Counsel with Respondent.

United States of America,

IN THE UNITED STATES SUPREME COURT.

THE STATE OF NEW JERSEY, *Appellee,* *and* EDWARD W. HALLINGER, *Appellant.*	*On Appeal from U. S. Circuit Court, District of New Jersey.*

To EDWARD W. HALLINGER,
Appellant,

and CHARLES J. PESHALL, Esq.,
Att'y for Appellant.

Take notice that I shall apply to this Honorable Court, at the Court Rooms at Washington, D C., on Tuesday, the 13th day of October, A. D., 1891, upon the opening of this Honorable Court on that day, or as soon thereafter as this Court can attend to the same, for an order affirming the judgment of the Hon. Edward S. Green, Justice of the United States District Court of New Jersey, sitting as Justice for the United States Circuit Court for said District, denying the writ of

habeas corpus herein upon the ground that said judgment is in all things in accordance with the law in such case made and provided, and upon the further ground, that the record upon appeal herein to this Hororable Court from said judgment has never been perfected and filed with the Clerk of this Court, and for such other reasons as may then and there appear in this behalf.

Dated Jersey City, Sept 18th, 1891.

C. H. WINFIELD,

Prosecutor of the Pleas and Solicitor of Appellee.

UNITED STATES OF AMERICA,

IN THE UNITED STATES SUPREME COURT.

THE STATE OF NEW JERSEY, *Appellee,* *and* EDWARD W. HALLINGER, *Appellant.*	*On Appeal from U. S. Circuit Court, District of New Jersey.*

To EDWARD W. HALLINGER,
Appellant,

and CHARLES J. PESHALL, Esq.,
Att'y for Appellant.

Take notice that I shall move this Honorable Court, at the Court Rooms at Washington, D. C., on Tuesday, the 13th day of October, A. D., 1891, upon the opening of this Honorable Court on that day, or as soon thereafter as this Court can attend to the same, for an order dismissing the appeal herein, heretofore taken from the judgment of Hon. Edward S. Green, Justice of the United States District Court for the District of New Jersey, sitting as Justice for the U. S. Circuit Court for said District upon his refusal to grant the writ of habeas corpus herein, upon the ground that the record upon appeal herein to this Honorable Court has never been perfected and filed with the Clerk of this Court, and for such other reasons as may then and there appear in this behalf.

Dated, Jersey City, N. J., Sept. 16, 1891.

CHARLES H. WINFIELD,
Prosecutor of the Pleas and Solicitor of the Appellee.

To the Honorable Edward S. Green, Judge of the District Court of the United States for the District of New Jersey. In Circuit,

The petition of Edward W. Hallinger, complainant, shows and states that he is a subject of Her Majesty Victoria, Queen of England and Empress of India.

That he is now unlawfully imprisoned, detained, confined and restrained of his liberty by John J. McPhillips Sheriff of Hudson County, State of New Jersey, in the jail of said County.

That the said imprisonment, detention, confinement and restraint is illegal.

That on the ——— day of April, A. D., 1891, your said petitioner was indicted by the Grand Jury of said Hudson County, as will fully appear by a copy of said indictment hereto attached marked "Exhibit A" and made a part hereof.

That on the 14th day of April, A. D., 1891, your petitioner was arraigned before the Honorable Manning M. Knapp, Judge of the Hudson County Oyer and Terminer.

That your petitioner entered the plea of guilty upon said arraignment to said indictment.

That thereupon and thereafter and in pursuance of Section 68, of the Criminal Procedure Act of the State of New Jersey, under and by virtue of which your petitioner was indicted and which reads as follows:—

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate any arson, rape, sodomy, robbery or burglary, shall be deemed murder of the first degree;

and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder, shall be tried, shall if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open Court, the Court shall proceed by examination of witnesses to determine the degree of the crime and give sentence accordingly," the said court proceeded to take the testimony of witnesses to determine the degree of the crime.

That thereupon and thereafter the said Court found that your petitioner was guilty of the crime of murder in the first degree. And did on the 12th day of May, A. D., 1891, sentence your petitioner to be executed on the 30th day of June, A. D., 1891.

That said act as aforesaid under and virtue of which he was convicted of the crime of murder in the first degree is unconstitutional and void, and in violation of the constitution of the United States and of the State of New Jersey, and also in violation of the treaty between the United States and Great Britain which guarantees to your petitioner the right of trial by Jury.

And your petitioner claims that the said court had no authority legally to determine that your petitioner was guilty of murder in the first degree and sentence him in the manner and form above stated.

Wherefore to be relieved of said unlawful imprisonment and detention, your petitioner prays that a writ of Habeas Corpus to be directed to the said John J. McPhillips may issue in his behalf so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require.

And that your petitioner be discharged.

EDWARD W. HALLINGER.

C. J. PESHALL,

Attorney for Petitioner.

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY, } ss:

Edward W. Hallinger, being duly sworn, deposes and and says that he is the petitioner named in the foregoing petition subscribed by him, that he has read the same and knows the contents thereof, and that the statements therein made he believes to be true.

Subscribed and sworn to before me this 29th day of June, 1891.

EDWARD W. HALLINGER.

WM. M. DOUGHERTY,
Master in Chancery of New Jersey.

(Endorsed) In the matter of Edward W. Hallinger, —Petition for Writ of Habeas Corpus,—in U. S. Circuit Court for New Jersey—C. J. Peshall, Attorney for Petitioner—Filed June 29, 1891.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

In the matter of Edward W. Hallinger for Writ of Habeas Corpus.

Now comes the said petitioner, Edward W. Hallinger by his Attorney Charles J. Peshall in his said behalf, moving and prays the court in his said petition for a Writ of Habeas Corpus to issue out of said Court. That upon the reading and filing of said petition, and upon consideration of the matters and things set forth, the court denies the issuance of the Writ as prayed

for. Thereupon the said Edward W. Hallinger by his said Attorney does move the Court to grant an appeal to the Supreme Court of the United States, which appeal is hereby granted.

EDW. S. GREEN,

Judge.

Dated June 29, 1891.

(Endorsed) United States Circuit Court—District of New Jersey—In re Edward Hallinger for Writ of Habeas Corpus—Allowance of Appeal—Filed June 29, 1891.

S. D. OLIPHANT, *Clerk.*

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } *Set.*

I, S. D. OLIPHANT, Clerk of the Circuit Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Petitition for Writ of Habeas Corpus and Allowance of Appeal, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the Seal of the said Court, at Trenton, in said District, this 17th day of September, in the year of our Lord oue thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

[SEAL.] S. D. OLIPHANT,

Clerk Circuit Court, U. S.

(*Endorsed.*)

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY.

In re Edward W. Hallinger, for Writ of Habeas Corpus. Certified Copy of Petition for Writ of Habeas Corpus and Allowance of Appeal.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF NEW JERSEY.

I, S. D. Oliphant, Clerk of the Circuit Court of the United States, for the District of New Jersey do hereby certify:

1 That on the 29th day of June, 1891, Edward W. Hallinger filed through his attorney, Charles J. Peshall, a petition for a writ of habeas corpus.

2. That on said day, Judge Green, United States District Judge for said District, sitting in said Circuit Court, considered said petition and refused a writ of habeas corpus.

3. That on said day said Edward W. Hallinger then prayed an appeal from said decision to the Supreme Court of the United States, and

4. That on said day said appeal was allowed, according to the Statute in such case made and provided.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Circuit Court, at Trenton, this seventeenth day of September, A D, 1891.

[SEAL.] S. D. OLIPHANT,
Clerk.

(Endorsed.)

SUPREME COURT OF THE UNITED STATES.

The State of New Jersey, *Appellee,*
and
Edward W. Hallinger, *Appellant,*
} *On Appeal, &c.*

Certificate of Clerk of Circuit Court of the U. S. District of N. J.

C. H. WINFIELD,
Sol. of Appellee.

STATEMENT OF FACTS AND APPELLEE'S BRIEF.

April 14, 1891. The Grand Jury in and for the body of the County of Hudson, in the State of New Jersey, presented to the Court of Oyer and Terminer held at Jersey City in and for said County, on that day, an indictment for murder against Edward W. Hallinger.

On the same day said Hallinger was arraigned before said Court upon said indictment, and thereupon did plead guilty.

The plea was not then accepted by said Court. Gilbert Collins, an Attorney of said Court, was appointed Counsel to advise with said defendant, and explain to him the effect of such a plea.

April 17, 1891. Said defendant with his counsel again appeared before said Court, and being again charged upon said indictment, again pleaded guilty, which plea was then and there accepted.

Whereupon said Court then appointed the 28th day of April, 1891, at the Court House in said City, as the time and place for the taking of testimony to determine the degree of guilt of said defendant under his plea to said indictment.

The statute under which said testimony was ordered taken is Section 68 of the Crimes Act, which reads as follows:

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, sodomy, robbery or

burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the Jury before whom any person indicted for murder shall be tried, shall, if they find snch person guilty thereof, designate, by their verdict, whether it be murder of the first or second degree; but if such person shall be convicted on confession in open Court, the Court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly."

April 28, 1891, testimony of witnesses was taken in pursuance of the order heretofore made, before the said Court in the presence of the said defendant by accompanied his counsel,in behalf,both of the state and of said defendant, to enable said Court to determine the degree of said defendant's guilt under his plea to said indictment.

May 12, 1891, the Court, after duly considering the testimony offered on the 28th day of April last, on behalf of the state and of the defendant, adjudge said defendant to be guilty of murder of the first degree, and then and there sentenced him to be hanged on June 30, 1891.

June 29, 1891, said Hallinger by his Attorney, Chas. J Peshall, filed in the office of the Clerk of the Circuit Court of the United States, District of New Jersey, a petition for a writ of Habeas Corpus.

On the same day the Honorable Edward S. Green, United States Judge for said District, sitting in said Circuit Court, considered said petition and refused the writ of Habeas Corpus.

On the same day the said Hallinger by his said Attorney prayed an appeal from the said decision to the Supreme Court of the United States, which said appeal was then and there allowed, and on the same 29th day of June, a certified copy of this allowance of said appeal was served on the Sheriff of the said County of Hudson.

The appeal has not been [redacted]ed; nor is it the intention of the defendant's counsel to perfect it. He

boasts of his power under the satute, to defeat the sentence of the Court by systematic obstructions.

I ask for an affirmance of the Judgment below, and the dismissal of the appeal for the following reasons:

1. That nothing has been done to perfect said appeal or to bring the hearing thereof before this Court.

2. That said appeal is without reason or justification, and was manifestly taken for the purpose of delaying the execution of the judgment of the Court and to defeat the ends of justice.

3. The practice of such appeals to this Court in criminal matters is attracting much public notice, and has become scandalous. In this case execution was stayed by simply serving on the Sheriff a copy of the allowance ot appeal. I submit that under the Statute, this was not sufficient; that an order of some competent Court should be required to stay execution in the hands of the Sheriff.

The language of the Statute making "null and void" what shall be done after the appeal is applicable to proceedings in Courts, and not to the actions of ministerial officers in executing a previous judgment.

It would be gratifying to have an expression of this Court on that point.

For these motions proper notices have been duly served on the appellant and his attorney.

Rule 6, Section 5 of the rules of this Court, makes provision for the uniting of a motion to dismiss with a motion to affirm, where it is manifest that the appeal was taken for delay only.

Rule 9, Subdivision 1, as amended and promulgated by this Court, January 26, 1891, provides that if appellant shall fail to docket the case and file the record, &c., that then the appellee may file a certificate of the Clerk of the Court below, stating the case and certifying that such appeal was allowed, and may then have the cause docketed and dismissed.

Where the appellant fails to file the record within the time prescribed, and it is filed by the appellee, the latter may have the cause dismissed.

United States vs. Fremont, 18 How. 30.

See also 92 U. S. 505.

If a transcript is not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal becomes inoperative, and the cause will be dismissed.

Blair vs. Muller, 4 Dall. 21.

Neitch vs. Farmers' Bank, &c., 6 Pet. 777.

The Virginia vs. West, 19 How. 182.

Overton vs. Cheek, 22 How. 46.

Mesa vs. United States, 2 Black, 721.

Caillot vs. Deetken, 113 U. S. 215.

See also 128, U. S. 258.

All of which is respectfully submitted,

CHARLES H. WINFIELD,

Prosecutor of the Pleas and Solicitor for Appellee.

146 U 8314

Office Supreme Court U. S.
FILED.
NOV 7 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1892.

Term No. 1100.

EDWARD W. HALLINGER, APPELLANT,

against

ROBERT DAVIS, JAILER OF HUDSON CO.,
APPELLEE.

Appeal from Circuit Court of the United States for the District of New Jersey.

BRIEF FOR APPELLEE.

C. H. WINFIELD,
Attorney for Appellee
and Prosecutor of the Pleas.

Supreme Court of the United States,

OCTOBER TERM, 1892.

Term No. 1100.

EDWARD W. HALLINGER, APPELLANT,

against

ROBERT DAVIS, JAILER OF HUDSON CO.,
APPELLEE.

Appeal from Circuit Court of the United States for the District of New Jersey.

BRIEF FOR APPELLEE.

C. H. WINFIELD,
Attorney for Appellee
and Prosecutor of the Pleas.

SUPREME COURT OF THE UNITED STATES.

EDWARD W. HALLINGER, APPELLANT,

against

ROBERT DAVIS, JAILER OF HUDSON COUNTY, N. J., APPELLEE.

STATEMENT OF FACTS.

On the 14th day of April, 1891, the above named appellant was indicted for the murder of Mary Peterson, at a Court of Oyer and Terminer and General Jail Delivery, duly held in and for the County of Hudson in the State of New Jersey, in which county the murder was committed on the 5th day of April, 1891.

On the 14th day of April, 1891, said defendant was arrainged before said Court and pleaded guilty. Whereupon the Court ordered said plea to be held in abeyance, and assigned Gilbert Collins, Esq., counsellor-at-law, to consult with said defendant and advise him concerning his plea.

On the 17th day of April, 1891, the defendant, with his counsel, again appeared before the Court and insisted on his plea of guilty. Whereupon the Court accepted the plea and continued said assignment of counsel and fixed Tuesday the 28th day of April, 1891, for examination of witnesses for the purpose of determining the degree of the crime of which said defendant was guilty.

On the 28th day of April, 1891, at the Court House in Jersey City, the Court in the presence and hearing of said defendant

and his counsel, witnesses were examined to enable the Court to determine the degree of defendant's crime, his counsel taking part by cross-examining witnesses.

On the 12th day of May, 1891, the Court, after hearing counsel for the defendant and for the State, determined the grade of his crime to be murder of the first degree, and then and there sentenced him to be hanged on the 30th day of June, 1891.

The statute applicable to said crime and under which said proceedings were taken may be found in the *Crimes' Act, Revision of New Jersey Statutes, p. 239, s. 68*, and is as follows :

"All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate, or premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate any arson, rape, sodomy, robbery, or burglary, shall be deemed murder of the first degree ; and all other kinds of murder shall be deemed murder of the second degree ; and the jury before whom any person indicted of murder shall be tried, shall, if they find such person guilty thereof, designate by the verdict, whether it be murder of the first or second degree ; but if such person shall be convicted on confession in open Court, the Court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly."

On the 29th day of June, 1891, the appellant filed with the clerk of the Circuit Court of the United States for the District of New Jersey his petition for the writ of *habeas corpus*. On the same day his petition was denied. Whereupon an appeal was taken to this Court, and a citation served on appellee.

On the 23d day of November, 1891, that appeal was dismissed by this Court because nothing has been done to perfect it.

On the 6th day of January, 1892, the said Court of Oyer and Terminer set the 10th day of February, 1892, as the day for the defendant's execution. Just before this last named day arrived the defendant filed another petition with the clerk of said Circuit Court for the writ of *habeas corpus* for the same reasons set out in his first petition.

On the 9th day of February, 1892, the petition was denied, an appeal taken to this court and citation served on appellee.

On the 2d day of May, 1892, this second appeal was dismissed by this Court because nothing had been done to perfect it.

On the 5th day of May, 1892, the said Court of Oyer and Terminer set the second day of June, 1892, as the day for the defendant's execution.

On the 30th day of May, 1892, the defendant filed another petition with the clerk of said Circuit Court for the writ of *habeas corpus* for the same reasons set out in his two former petitions. On the same day this petition was denied, an appeal taken to this Court and citations served on appellee.

This last appeal is numbered 1,100 on the Docket of this Term.

POINTS MADE BY THE RECORD.

From the petition on file in this case it is clear that the appellant was indicted for murder, pleaded guilty, and under the statute the Court determined the grade of his crime to be murder in the first degree and sentenced him accordingly.

Against this proceeding several objections are set up in the appellant's petition.

First.—That he is restrained of his liberty in violation of the constitution and laws of the United States, and in violation of the constitution and laws of the State of New Jersey, and in violation of the Treaty between the United States of America and Great Britain.

Second.—That he was tried and convicted by the Judges of the Court of Oyer and Terminer and General Jail Delivery of Hudson County—without the interposition of a Jury—by them found guilty of murder of the first degree, and sentenced to death.

Third.—That no Jury was ever impanelled to pass upon his guilt or innocence.

Fourth.—That he has never waived his right to a trial by Jury, and that there is no law authorizing him to waive such right.

Fifth.—That he has been convicted and sentenced to death without due process of law.

Sixth.—That he is of the African race and black, and that by reason of his race and color he is deprived of the equal protection of the laws.

Seventh.—That the indictment returned against him does not charge him with the crime of murder in the first degree; and that he has been convicted of an offence for which he was not indicted.

Eighth.—That the sixty-eighth section of the Crimes Act under which he was indicted and convicted, is unconstitutional and void.

To these insistments I reply:

I.

Relief from the alleged errors or wrongs in this case cannot be obtained under the writ of *habeas corpus*. An inspection of the record will show that the Court of Oyer and Terminer had complete jurisdiction over the person of the appellant and of

the crime charged against him If a question under the constitution and laws of the United States arose in the case, "the Court that tried him was competent to guard and enforce every right secured to him by that instrument and which might be involved in his trial. The petition for the writ sets forth no ground affecting the jurisdiction, either of the offence charged or of the person alleged to have committed it."

In re. Wood, 140 U. S., 287.

"It is only when the trial court is without jurisdiction of the person or the cause and a party is subjected to illegal imprisonment in consequence that the writ of *habeas corpus* may be revoked." *Ex parte Ulrich, 43 Fed. Reporter, 663.*

In *Ex parte Sidold, 100 U. S., 375,* Judge Bradley said: "The only ground on which this Court or any Court without some special statute authorizing it will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such Court over the person or the cause or some other matter rendering it's proceedings void."

"This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *ex parte Lange, 18 Wall., 163* and *ex parte Parks, 93 U. S., 18.* In the former case we held that the judgment was void and released the prisoner accordingly; and in the latter we held that the judgment, whether erroneous or not, was not void because the Court had jurisdiction of the cause; and we refused to interfere."

II

But the claim is made that although the writ of *habeas corpus* is not the proper proceeding in the orderly practice of this Court and that no relief can be obtained thereby except such as comes from the obstruction of the administration of justice,

the statute authorizes the proceeding; and further, that an appeal from the final decision of the Circuit Court may be taken as often as said Court declines to grant the writ, and that neither the Circuit nor this Court has power to put an end to this practice. This cannot be the law for there is neither justice nor reason in it.

The statute *Rev. Stat. U. S., s. 764*, provides for an appeal from *the final decision* of the Circuit Court. To enable the Circuit Court to render such decision it must have jurisdiction. I submit that Congress never intended to give an appeal from a simple refusal to act where the Court had no jurisdiction to render a "final decision."

If Congress did not intend to obstruct the due and orderly administration of the criminal law in the States by statutory stay when an appeal is taken from a refusal to grant the writ where the Court clearly could not grant it, then such power is not in the statute, and the practice which has grown up of obstructing the course of justice by appeal after appeal on the same state of facts is as unwarranted as it is vicious. Where there is no jurisdiction, there can be no final decision on the merits.

However frivolous the petition for the writ may be, and however clearly it appears to be beyond the power of the Court to grant it, it is claimed such refusal is a "final decision" from which an appeal lies, which acts as a stay. An appeal from nothing blocks the wheels of justice, and that this may be repeated without limit. It seems absurd that an appeal from a refusal to grant an injunction should immediately assume the force and effect of an injunction.

I submit that the "final decision" in the statute from which an appeal is allowed is applicable only where the Court has jurisdiction—for the power to refuse implies the power to grant. It is an act of the will in one case as in the other. But

where the Court has no jurisdiction to grant, it cannot have jurisdiction to refuse or make "final decision," and there ought to be no appeal.

It is not affirmative or negative action that is appealed from but simply non-action from want of power to exercise discretion.

In *Ripalje and Lawrence's Law Dictionary, Refusal* is defined, as follows: "Where one has by law a right and power of having or doing something of advantage, and he declines it."

This must have been the view of Judge Jackson of the Circuit Court of the United States for the District of Tennessee, in the recent case of H. Clay King. King was under sentence of death and petitioned for the writ of *habeas corpus*. Judge Jackson refused it and declined to give an appeal from such refusal.

But in all fairness does the act give more than one appeal from refusal on the same state of facts to grant the writ, even though the Court has jurisdiction to grant it. The absurdity to which an affirmative answer would lead us seems to justify a negative answer. If not, a man in this appellant's situation might have his petitions printed in numbers sufficient to last for an ordinary life time, and present one to the Circuit Court immediately after the dismissal of or adverse decision on the former by this Court.

Hallinger was sentenced to be executed on June 30th, 1891. On June 29th he filed his petition, the writ was refused, appeal taken, citation signed by the Judge and served. It was November 23rd before that appeal could be dismissed—five months delay, the only object of the petition and appeal. The second day set for his execution was February 10th, 1892. On February 9th Hallinger filed another petition on the same facts for the writ It was refused, appeal taken, citation signed by the Judge and served. The hand of justice was again stayed —the only object of the petition and appeal. It was May 2nd

before that appeal could be dismissed, three months delay. The third day set for his execution was June 2nd. On May 30th Hallinger filed another petition, on the same facts, for the writ. It was refused, appeal taken, citation signed by the Judge and served. The hand of justice was again stayed—as it has been for sixteen months.

Dismissal of the appeal has thus far resulted only in another application, refusal and appeal. Whether an adjudication by this court will meet a different fate remains to be seen. How long is this game of battledore and shuttlecock to go on? Why dismiss one appeal if another is to take its place in continuing and ~~disgusting~~ monotonous repetition.

"While the Courts of the United States have power upon *habeas corpus* to inquire into the cause of the detention of anyone claiming to be restrained of his liberty in violation of the constitution, or laws, or treaties of the United States, it was not intended by Congress that they should by writs of *habeas corpus* obstruct the ordinary administration of the criminal laws of the States through their own tribunals."

In re Wood, 140 U. S., 289.

In re Jugiro, 140 U. S., 291, the Trial Court, on the dismissal of the appeal to this Court and before the mandate was issued, proceeded on the 1st day of December, 1890, to name another day for his execution. Application was made for the writ of *habeas corpus*. It was refused and an appeal taken. This Court held that "nothing but an entire want of jurisdiction in the State Court to make the order of Dec. 1st, 1890, could have justified the Circuit Court in interfering with its proceedings by writ of *habeas corpus*."

There is another view which I respectfully suggest to this Court. If an appeal is taken from a refusal of the Circuit Court to act in a matter where it had no ~~justification~~ jurisdiction to render a "final decision" can it be said on appeal therefrom that the

matter is "in process of being heard and determined," and would "proceedings against the person" imprisoned be "null and void"? If the Circuit Court has no jurisdiction to make "final decision" how can this Court by appeal get jurisdiction? If it cannot, then how can it be said that after such appeal the subject matter is "in process of being heard and determined"? If it is not then how can "proceedings against the person" imprisoned be "null and void."

III.

The first. second, third, fourth and eighth grounds of objection in the petition for the *habeas corpus* are resolvable into one objection to the section of the statute under which the appellant was convicted and sentenced, and this resolves itself into the following insistments.

1. He had no trial by jury secured to him by the Constitution.

2. He never waived his right to a trial by jury.

3. He could not waive his right to such a trial.

1. The appellant's plan of procedure precluded the possibility of a trial by jury. "When a prisoner on his arraignment hath pleaded not guilty, and for his trial hath put himself upon the Country, which Country the jury are, the Sheriff of the County must return a panel of jurors." *4. Bl. Comm. Chap. 27.*

The statute recognizes his right to plead guilty, and before the st atute it was his common law right. He availed himself of that right and thus placed a trial by jury beyond the reach of Constitutions or Treaties. There never was an issue for a jury to try. He knew when he confessed his guilt that there could be no jury. If it is constitutional and legal for a guilty man to tell the truth and confess his guilt, and if it is consti-

tutional and legal for the court before whom he is arraigned to believe him, and render judgment, then there is no objection to the plea in this case. Why is a criminal asked whether or not he is guilty if there is but one Constitutional answer?

The statutory recognition of the defendant's right to plead guilty to the charge of murder "recognizes the rule which has always been the rule of the common law that a party may be convicted on his own plea and confession in Court, and that in such cases the intervention of a jury to determine his guilt is not necessary." *Green vs. Commonwealth. 12 Allen 167.*

2. Did the appellant waive his right of trial by jury?

"If the defendant has consented to any step in the proceedings, or if it has been taken at his request, or he did not object to it at the proper time when he might, he cannot afterwards complain, however contrary it was to his constitutional, statutory, or common law rights." *1 Bish. Cr. L., sections 118, 119.*

When he pleaded guilty, he waived his right of trial by Jury.

3. But it is claimed that the appellant could not by any act of his waive his right of trial by Jury.

To whom does the right of trial by Jury belong? *Section* 8 of our Bill of Rights says: "The *accused* shall have the right to a speedy and public trial by an impartial Jury." *Section* 7 of the Bill of Rights provides that, "the right of a trial by Jury shall remain inviolate."

It will be observed that both of these provisions are in a declaration of the rights belonging to men, people, citizens, persons, prisoners, and those accused of crimes. It does not contain a single declaration of any right belonging to the State or the public as a corporate power.

The statute in New Jersey concedes his right to waive a trial by Jury by recognizing his right to plead guilty.

In the Constitution of the State of New Jersey, Article I, par. 9, provides that "No person shall be held to answer for a criminal offence unless on the presentment or indictment of a Grand Jury, except in cases of impeachment or in cases cognizable by Justices of the Peace, or arising in the Army or Navy, or in the Militia when in actual service in time of war or public danger."

Paragraph 8 of the same Article is as follows: "In all criminal prosecutions the accused shall have a right to a speedy and public trial by an impartial jury."

In 1867 the Legislature of New Jersey passed an act entitled, "A Supplement to an Act to Facilitate Judicial Proceedings in the County of Essex." By this act it was provided that "whenever any person shall be charged upon oath, before any Justice or Police Justice, in the County of Essex, with any offence now triable by law before the Court of General Quarter Sessions of the Peace, and such person shall, in writing signed by him or her, addressed to the Prosecutor of the Pleas of said county, waive indictment and trial by jury, and request to be tried immediately, it shall be the duty of said Prosecutor, unless he and the Presiding Judge of the Common Pleas of said county shall think the public interest will be benefitted by denying said request, to apply to the Presiding Judge of the Court of Common Pleas of said county, for the immediate trial of said person; and said Presiding Judge shall thereupon call a Court of Special Quarter Sessions to be comprised of himself and at least two other judges of said Court, which Court is hereby empowered and required to try said p rson with all due speed having due regard to the circumstances of the case, the public benefit and the possibility of obtaining necessary witnesses, and to determine and adjudge the guilt or innocence of the person charged."

Under this act one Charles Edwards with three other persons was charged with larceny and receiving goods of the value of sixteen dollars. In writing addressed to the Prosecutor he waived indictment and trial by jury and requested to be tried under the provisions of said act. The request was granted and June 19, 1882, set down for the hearing of the accusation. On that day Edwards applied in writing for leave to withdraw his application for trial under the statute. The Court refused leave to withdraw and proceeded to trial. The accused were found guilty and Edwards was sentenced to the Reform School until he should reach the age of 21 years. From this judgment he took out a writ of error to the Supreme Court and set up the constitutional provisions, which I have cited, and claimed that because of them he could not be tried without indictment and a jury. Held; Judge Depue delivering the opinion.

"Both of these provisions are for the benefit of the accused, and both are subject to that fundemental rule of law that a person may renounce a provision made for his benefit and to that maxim *Quilibet potest renunciare juri pro se introducto* which applies as well to Constitutional law as to any other.

"The Constitutional rights of an accused are not infringed where two modes of preferring a criminal accusation and two modes of trial are provided by law—one by indictment and trial by jury, the other by a written accusation and trial by the Court—and the option is given to the accused to have the accusation submitted to a Grand Jury, with trial by jury in case an indictment be found, or to submit to a trial on a written accusation, and by the Court without a jury."

Edwards vs. State, 16 *Vroom*, 4, 19.
1 *Bishop, Cr., Pro. s.* 759.
Wharton, Cr. Pl. and prac. 733.

A statute in Connecticut provided that in all prosecutions the party accused, if he should so elect, might be tried by the Court instead of by the Jury; and that in such cases the Court should have full power to try the case and render judgment. *Held*, not to conflict with the provisions of the Constitution, that every person accused "shall have a speedy public trial by an impartial Jury;" and that "the right of trial by Jury shall remain inviolate."

State vs. Worden, 46 Conn., 349.

"The benefit of statutory and constitutional provisions, both in civil and criminal jurisprudence, may be waived by a party interested. A person ought not to be heard to complain of that to which he has consented."

State vs. Albee, 61 N. H., 428.

"It was the ancient rule of the common law that a party charged with crime, whatsoever may be its degree or nature, may be convicted on his own plea and confession in Court; and that in such cases no trial by Jury is to be had."

Green vs. Conn., 12 Allen, 168.

In the Bill of Rights of New Hampshire, *Article 17*, is as follows: "In criminal prosecutions the trial of facts in the vicinity where they happen is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county than that which it is committed," &c.

In *State vs. Albee supra*, the Court held "this provision in our bill of rights, designed for the protection of the accused, was regarded by the framers of the constitution as a privilege of the highest importance because it would prevent the possibility of sending him for trial to a remote county, &c. The purpose of this constitutional provision was the protection, not the destruction, of individual rights. The constitutional provision is an affirmance of the prisoner's common law right not to be

The statute has not changed the crime of murder as defined at the common law, but has merely broken it into grades. In other words, the statute has made two degrees of precisely the same crime for the purpose of properly fixing the degrees of punishment. Hence an indictment charging murder in the common law form includes the highest grade of crime, and a general verdict of guilty leaves nothing to determine but the degree of the crime of which defendant has been found guilty.

His plea of guilty confessed everything that was duly set forth as fully as the plea of not guilty would have put in issue every charge properly pleaded. When he pleaded guilty to the indictment charging him in common law form with deliberate and premeditated killing, he confessed that he was guilty of the common law crime of murder. This has not been altered by the statute, but for which a judgment of death would have been imperatively required. The indictment includes both grades of the crime; and therefore, he was indicted for murder in the first degree.

VII.

The only remaining objection to the proceedings in the Oyer and Terminer is that a Jury was not awarded to determine the grade of the crime to which he had confessed, and that the Court heard the evidence and determined the degree.

The act provides in express terms that the accused may have his choice of two modes of determining the degree of his crime, either by a Jury on his plea of not guilty, or by the Court on his plea of guilty; and if he supposed the Court the safer mode of such determination, and for that reason pleaded guilty, he expressly waived the other mode. It then became the duty of the Court to ascertain before judgment whether the extreme sentence was warranted by the facts.

New Jersey is not alone with such a statute and such a practice. At Philadelphia on October 26th, 1892, John Hart-

nett, under indictment for murder, retracted his plea of not guilty and pleaded guilty. After hearing testimony Judge Reed fixed the grade of crime at murder in the second degree.

The Statute of California in relation to this subject is in the identical language of the statute of New Jersey. In the *People vs. Noll*, 20 *Cal.*, 164, the defendant on arraignment pleaded guilty. Thereupon witnesses were examined to ascertain the grade of the crime. The Court found it to be murder of the first degree and sentenced him accordingly. One of the errors assigned was:

"That after the plea of 'guilty' by the defendant was entered, the Court did not call a jury to hear evidence and determine the degree of guilt."

Held.—"The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the constitution or of any statute which prevents a defendant from pleading guilty to the indictment instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury."

In Ohio the statute is: "If the offence charged is murder, and the accused be convicted by confession in open Court, the Court shall examine the witnesses and determine the degree of the crime, and pronounce sentence accordingly."

Ohio Statutes, § 7316.

The case of *Craig vs. State*, 30 *Northeastern Rep.*, 1120, arcse under this statute. The defendant had pleaded not guilty to an indictment for murder, this plea he retracted and pleaded guilty. Thereupon the Court proceeded to hear evidence tending to show the degree of the crime. To this no objection was made by the defendant or his counsel.

Held, that the statute authorized this course, and that the act was constitutional and valid.